

General Matthew O. Bahrenburg represented the Commissioner at the conference. Attorney LeRoy P. Anseth of Williston represented the Respondents at the conference. Counsel agreed to have the ALJ decide this matter in summary fashion upon the filing of a stipulation of facts and briefs. They agreed that a hearing was not necessary. The ALJ set a briefing schedule. *See* August 22, 2001, letter Prehearing Conference Summary and Briefing Schedule.

Mr. Bahrenburg filed the Commissioner's Motion for Summary Order, and Brief in Support of Motion for Summary Order on September 7, 2001. Mr. Bahrenburg filed the Stipulation of Facts agreed to by the parties on September 21, 2001. Mr. Anseth filed the Respondents' Brief of Robert Pagan on October 1, 2001. Mr. Bahrenburg filed the Commissioner's Reply Brief in Support of Motion for Summary Order on October 8, 2001. Although the Stipulation of Facts refers to an "Attachment A," a franchise agreement, it was not attached to the stipulation. However, a franchise agreement (presumably the same as the proposed Attachment A) was attached to the Respondents' brief as Exhibit "1", and the ALJ has treated them as the same document. (Counsel for the Respondents sometimes refers to the franchise agreement in his brief as Exhibit "1", sometimes as Exhibit "A".) In this decision the ALJ will refer to the franchise agreement as "Attachment A."

Based on the Stipulation of Facts, with Attachment A, and the briefs of counsel, the administrative law judge makes the following recommended summary disposition in the form of recommended findings of fact and conclusions of law, and recommended order.

FINDINGS OF FACT

The Stipulation of Facts, including Attachment A, is the findings of fact in this matter. The ALJ will make no separate findings of fact. However, it is noted for purposes of this decision and the recommended order that results from this decision that Robert Pagan is the

owner of the business known as K-Ram Industries. Robert Pagan and the three purchasers of the K-Ram franchise are the only parties to the franchise agreement. Attachment A.

CONCLUSIONS OF LAW

1. It is clear from the Stipulation of Facts and the attached franchise agreement to the stipulation that Robert Pagan sold the K-Ram Franchise located in Williston, ND, a carpet-cleaning company, to three individuals. Attachment A. It is also clear that he sold it to those three individuals as a franchise. *Id.* By the greater weight of the evidence, the facts support the Commissioner's and, indeed, the stipulation's assertion that there was a sales transaction that involved the sale of a K-Ram franchise by Pagan to the three individuals.

2. Under N.D.C.C. § 51-19-02(5)(a), a franchise is defined as a contract or agreement that contains three elements. It is clear that all three of those elements meeting the definition of a franchise are found in the contract or agreement that is the subject of this administrative matter. Attachment A. *See* Reply Brief at 1-3.

3. Under N.D.C.C. § 51-19-03, “[I]t is unlawful for any person to offer to sell any franchise in this state unless the offer of the franchise has been registered under ... [chapter 51-19] or exempted under section 51-19-04.” The K-Ram franchise was not registered as a franchise in North Dakota. Therefore, in selling the K-Ram franchise to the three individuals, Pagan violated § 51-19-03, unless the K-Ram franchise is exempt from registration under N.D.C.C. § 51-19-04.

4. There are no facts in the stipulation or Attachment A to support or even suggest an exemption to § 51-19-03 under § 51-19-04. If the Pagan intends to rely upon an exemption, he must show that it exists; he has not.

5. Under N.D.C.C. § 51-19-13(2)(f), if the Commissioner finds that any franchise has been or is being offered for sale without the offer first being registered, the Commissioner “may order the franchisor or offeror of the franchise to desist and refrain from the further offer or sale of the franchise...” and “may impose by order and collect a civil penalty in an amount not to exceed ten thousand dollars for each violation...” The Commissioner did issue a Desist and Refrain Order against the Respondents and did impose a \$10,000 civil penalty in his Order for Civil Penalty against the Respondents.

COMMENTARY ON FINDINGS OF FACT AND CONCLUSIONS OF LAW

In Pagan's brief, counsel first of all argues that the agreement is not a franchise agreement; but it clearly is such. He then argues that it is an exempt agreement, a sale of a business; but, there are no facts to prove that argument, and Attachment A belies that argument. Then, counsel argues that although, perhaps, the Respondents should have complied with the Franchise Investment Law (ch. 51-19) by registering the franchise that was being sold, failure to do so was a “trifle” or an “idle act.” Brief of Robert Pagan at 3. Registration was, apparently, something “that was immaterial and would have been granted by the Commissioner anyway and therefore the law disregards the necessity of doing it.” *Id.* Counsel claims that no one was hurt by this sale. In fact, he says, it was a beneficial sale to all the parties. Therefore, counsel apparently concludes, for all these various reasons, the “[c]ourt” should either rule that there was no sale of a franchise but, rather, the sale of a business, or if there was a sale of a franchise, it was an exempt sale or that registration was such a trifle or idle act that it should not be required. *Id.* at 4.

Counsel especially takes exception to the imposition of a \$10,000 civil penalty against the Respondents, claiming that the Commissioner has “lamblasted” (*sic*) a North Dakota “businessman,” an “average citizen.” *Id.*

As counsel for the Commissioner points out in his brief, however, this matter only came to the Commissioner by way of complaint from one of the purchasers of the franchise. Reply Brief at 3-4. Although there is no evidence of record in this regard, counsel is merely responding to the Respondent's assertions, that are also outside of the stipulation, by relating the history of this administrative action. The ALJ could take official notice of some of these facts, as they may be relevant facts, but it is really not necessary to do so considering the stipulation and the actual facts clearly stated in the stipulation, and the attachment to the stipulation, and the results necessarily concluded from them. Actually, this matter involves a clear-cut violation of the law, and any violation of the Franchise Investment Law is serious in some degree. Counsel for the Commissioner rejects the notion that registration of a franchise is or can be a trivial matter, and the ALJ does too.

The Commissioner has discretion to impose a civil penalty of not to exceed \$10,000 under N.D.C.C. § 51-19-13(2)(f). Although \$10,000 may seem to be unduly harsh on the surface, for a first-time failure to register a franchise, when there is only one franchise agreement involved, there are no facts on the record in mitigation to indicate a lesser penalty or in aggravation to indicate that this proposed penalty is appropriate. Therefore, the ALJ is not in a position to recommend something different with regard to the civil penalty. However, the violation is clear and this sale obviously involved a great deal of money for the purchasers of the K-Ram franchise. Attachment A. The Commissioner must decide whether to change her mind

about the amount of appropriate Civil Penalty because the ALJ will not recommend something different.

RECOMMENDED ORDER

The greater weight of the evidence shows that Respondents, through the actions of Pagan, violated the provisions of N.D.C.C. § 51-19-03, and that there is no applicable exemption to the violation under N.D.C.C. § 51-19-04. Therefore, the Commissioner's Desist and Refrain Order was an appropriate administrative action. Also, the Order for Civil Penalty was an appropriate administrative action. Both actions are affirmed. Robert Pagan, as the sole owner of K-Ram Industries, is individually responsible and shall pay the \$10,000 civil penalty imposed by the Commissioner in this matter.

Dated at Bismarck, North Dakota, this 16th day of October, 2001.

State of North Dakota
Karen Tyler
Securities Commissioner

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